



FR-4915-01-P

SURFACE TRANSPORTATION

49 CFR Parts 1108 and 1115

[Docket No. EP 730]

Revisions to Arbitration Procedures

AGENCY: Surface Transportation Board.

ACTION: Final rules.

SUMMARY: The Surface Transportation Board (Board or STB) adopts changes to its arbitration procedures to conform to the requirements of the Surface Transportation Reauthorization Act of 2015.

DATES: These rules are effective on October 30, 2016.

ADDRESSES: Information or questions regarding these final rules should reference Docket No. EP 730 and be in writing addressed to: Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001.

FOR FURTHER INFORMATION CONTACT: Amy C. Ziehm at 202-245-0391.

[Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.]

SUPPLEMENTARY INFORMATION: Under Section 13 of the STB Reauthorization Act (codified at 49 U.S.C. 11708), the Board must “promulgate regulations to establish a voluntary and binding arbitration process to resolve rail rate and practice complaints” that are subject to the Board’s jurisdiction. Section 11708 sets forth specific requirements and procedures for the Board’s arbitration process. While the Board’s existing arbitration

regulations¹ are for the most part consistent with the new statutory provisions, certain changes are needed so that the Board's regulations conform fully to the requirements under section 11708.

On May 12, 2016, the Board issued a Notice of Proposed Rulemaking (NPR), proposing to modify its existing arbitration regulations, set forth at 49 CFR part 1108 and 49 CFR 1115.8, to conform to the provisions set forth by the statute and to make other minor clarifying changes. Specifically, the Board proposed adding rate disputes to the list of matters eligible for arbitration under its arbitration program and barring two matters from the arbitration program (disputes to prescribe for the future any conduct, rules, or results of general, industry-wide applicability and disputes solely between two or more rail carriers). For rate disputes, pursuant to section 11708(c)(1)(C), the proposed rules indicated that arbitration would be available only if the rail carrier has market dominance (as determined under 49 U.S.C. 10707). The Board sought comment on whether parties should be given the option to concede market dominance, thereby forgoing the need for a determination by the Board under 49 U.S.C. 10707.

The Board also proposed that, as an alternative to filing a written complaint, arbitration could be initiated by the parties if they submit a joint notice to the Board indicating their consent to arbitrate. In accordance with section 11708(g), the Board proposed setting the maximum amount of relief that could be awarded under the arbitration program to \$25,000,000 in rate disputes and \$2,000,000 in practice disputes.

¹ In Assessment of Mediation & Arbitration Procedures, EP 699 (STB served May 13, 2013), the Board adopted modified rules governing the use of mediation and arbitration to resolve matters before the Board. The rules established a new arbitration program under which shippers and carriers may voluntarily agree in advance to arbitrate certain disputes with clearly defined limits of liability.

The Board also proposed rules to establish a process for creating and maintaining a roster of arbitrators and selecting arbitrators from the roster in accordance with section 11708(f). Pursuant to section 11708(d) and (h), the proposed rules would also modify the requirements for, and applicable standard of review of, arbitration decisions, which are to be “consistent with sound principles of rail regulation economics.” The proposed rules would also modify the deadlines governing the arbitration process in accordance with the statutory provisions. Lastly, the proposed rules would correct an inadvertent omission made in Docket No. EP 699 that unintentionally removed the Board’s standard of review for labor arbitration cases.

The Board sought comments on the proposed regulations by June 13, 2016, and replies by July 1, 2016. The Board received comments from seven parties: Association of American Railroads (AAR), American Chemistry Council (ACC), National Grain and Feed Association (NGFA), Growth Energy, Rail Customer Coalition (RCC), National Industrial Transportation League (NITL), and Samuel J. Nasca on behalf of SMART/Transportation Division, New York State Legislative Board (SMART/TD-NY). AAR, ACC, and SMART/TD-NY also filed replies.

After giving consideration to the comments and suggestions submitted by parties, the Board clarifies and modifies its proposed rules, as discussed below.

Creating and Maintaining the Roster. Under section 11708(f)(1), arbitrators on the roster must be “persons with rail transportation, economic regulation, professional or business experience, including agriculture, in the private sector.” The NPR further proposed that arbitrators be required to have training in dispute resolution and/or experience in arbitration or other forms of dispute resolution. Under the proposed rules,

the Chairman would have discretion as to whether an individual meets the qualifications to be added to the roster.

NGFA and ACC suggest revising the proposed rules so that all Board members would have input as to which applicants are qualified and should be included in the roster. (NGFA Comments 6, ACC Comment 4.) The Board agrees that all Board Members should have input in establishing the roster of arbitrators. (See NGFA Comments 6.) The final rules will provide that the Chairman will solicit input and recommendations from all Members in selecting qualified individuals to be included in the arbitrator roster, which will then be established by a Board no-objection vote.

AAR asserts that the Board should have no discretion to exclude qualified individuals from the roster. (AAR Comment 5.) Rather, AAR suggests that the Board adopt a more transparent process in which individuals meeting set criteria would automatically be added to the roster. Under this process, an applicant would submit a narrative describing his or her qualifications, which would then be posted for a 20-day comment period. (AAR Comment 6.) The Board would add all uncontested applicants to the roster, but if there is an objection, the Board would decide whether the individual should or should not be added and issue a decision explaining its reasoning. (Id.) The Board finds this additional process to be unnecessarily inflexible for creating and maintaining a roster of qualified individuals. Soliciting input from all Board Members concerning the roster, and requiring a final Board no-objection vote as discussed above, should ensure that a comprehensive list of qualified arbitrators with necessary expertise is developed. Additionally, allowing for Board input and discretion is consistent with the statutory requirement that the roster be “maintained by the Board.” 49 U.S.C. 11708(f).

AAR suggests that the Board establish additional qualifications for arbitrators, such as “10 years of experience and a professional reputation for fairness, integrity and good judgment.” (AAR Comment 5.) The Board finds the additional qualifications suggested by AAR to be unnecessary. The rules adopted here require individuals seeking to be on the roster to have training in dispute resolution and/or experience in arbitration or other forms of dispute resolution. To that end, individuals seeking to be on the roster should include in their notice to the Board details about their relevant training and/or experience (including the number of years of experience). In creating and maintaining the roster, Board Members will thus be able to assess each applicant’s qualifications and determine which individuals could ably serve as arbitrators based on the criteria established in these rules. In addition, the parties can make their own assessments regarding an arbitrator’s “fairness, integrity, and good judgment” during the party-driven selection process we are adopting, discussed below under “Selection of Arbitrators.”

We are adopting the proposal in the NPR to publish the roster on the Board’s website to allow the parties to make that assessment of the arbitrators’ qualifications. AAR also suggests that each arbitrator’s fees and area(s) of expertise be included on the roster. (AAR Comment 6.) The Board agrees that publication of each arbitrator’s fees and area(s) of expertise would be helpful to the parties in selecting an arbitrator and has amended the proposed rules accordingly.

Lastly, the NPR proposed that the Chairman, at any time, may add qualified individuals to the roster. The Board clarifies here that the names of eligible arbitrators who have consented to being included on the roster would only be added by a Board no-objection vote.

Selection of Arbitrators. The NPR proposed revising the arbitration selection process to be used when parties cannot mutually agree on a single arbitrator or lead arbitrator of a panel of arbitrators. The Board proposed that it would provide parties a list of not more than 15 arbitrators culled from the Board's roster. The parties would then select a single or lead arbitrator by alternately striking names from the list until only one remains, in accordance with section 11708(f)(3)(A).

AAR proposes a two-step, party-driven approach to selecting a single or lead arbitrator. (AAR Comment 6-8.) First, parties would be given the opportunity to remove individuals from the roster for cause in their particular dispute, such as partiality or lack of independence. Second, each party would submit a list of up to 10 potential arbitrators. If only one arbitrator appears on both lists, he or she would be selected as the single or lead arbitrator. If multiple arbitrators appear on both lists, the parties would alternatively strike names until one remains, beginning with the complainant. If no name appears on both lists, the parties would alternatively strike from the Board's entire roster, as culled by those that are disqualified for cause. In its reply, ACC expressed support of AAR's approach, but stressed that the standard for removing an arbitrator from the roster must be defined narrowly and require clear evidence of bias. (ACC Reply 3.)

The Board agrees that a party-driven approach to selecting an arbitrator is preferable, as parties are in the best position to assess whether an arbitrator is suitable for a particular dispute. However, the first step of AAR's proposal presents the need to define the standard for removing a name from the roster and could potentially require the Board to determine whether a name on the roster was properly removed "for cause." This could turn selection of the arbitrator into a cumbersome and adversarial process,

when the purpose of arbitration is supposed to be an expedited alternative to adjudication. Accordingly, the final rules will adopt AAR's two-step approach to selecting a single or lead arbitrator, but modified so that, under the first step, rather than allowing parties to remove arbitrators for cause, each party will be given three peremptory strikes to remove names from the entire roster without offering a reason.² Then, as proposed by AAR, from the remaining arbitrators on the roster, each party would submit a list of up to 10 potential arbitrators. If only one arbitrator appears on both lists, he or she would be selected as the single or lead arbitrator. If multiple arbitrators appear on both lists, the parties would alternatively strike names of the jointly listed arbitrators until one remains, beginning with complainant. If no name appears on both lists, the parties would alternatively strike from the Board's entire roster, as amended based on the peremptory strikes.

Arbitration Decisions. Under section 11708(c)(3) and the proposed rules at 49 CFR 1108.4, an arbitrator or panel of arbitrators resolving rate reasonableness disputes shall consider the Board's methodologies for setting maximum lawful rates, giving due consideration to the need for differential pricing to permit a rail carrier to collect adequate

² The Board will limit peremptory strikes because otherwise parties could strike all names on the list except that party's top choice. If that were to happen, then under our rules, the parties would revert to alternatively striking names from the entire roster, which would defeat the purpose of allowing parties to help cull the roster before the alternative-striking process starts. It is reasonable to allow each party three peremptory strikes. Prior to the modified arbitration regulations adopted in Docket No. EP 699, the Board maintained a roster of arbitrators, which had around 35 individuals. Using that roster as a guide, three peremptory strikes per party would allow the parties to cull about 20% of the roster before the alternative-striking process begins, which is a substantial percentage. Moreover, our rule is similar to 28 U.S.C. 1870, which allows each party in federal civil litigation three peremptory challenges in selecting a jury.

revenues (as determined under 49 U.S.C. 10704(a)(2)). As for the actual arbitration decisions, in accordance with section 11708(d), the proposed rule at 49 CFR 1108.9 states, “[a]ll arbitration decisions must be consistent with sound principles of rail regulation economics.” Likewise, in accordance with section 11708(h), the proposed rule at 49 CFR 1108.11 states that, “[t]he Board will review a decision to determine if the decision is consistent with sound principles of rail regulation economics.”

AAR requests that the Board revise the proposed rules so that the language contained in § 1108.4 be added to the proposed rules regarding arbitration decisions at §§ 1108.9 and 1108.11. (AAR Comment 3.) Specifically, AAR would require arbitration decisions resolving rate disputes to “give due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues (as determined under section 10704(a)(2)).” AAR would also include this requirement under the Board’s standard of review. ACC argues that AAR’s proposed changes are unnecessary, because, under the proposed rules, arbitration decisions “must be consistent with sound principles of rail regulation economics,” which include differential pricing. (ACC Reply 1-2.) ACC asserts that adopting AAR’s proposal would inappropriately add requirements to arbitration decisions beyond what the statute provides and would broaden the Board’s standard of review. (Id.)

The Board agrees that this additional language would go beyond the statutory requirements for arbitration decisions, and effectively broadens the Board’s narrow standard of review. AAR’s proposed changes to §§ 1108.9 and 1108.11 will therefore not be adopted.

Under the proposed rule at § 1108.9, an unredacted draft of the arbitration decision would be made available to the parties to the dispute. AAR requests that the final rule account for the fact that an arbitration decision may contain highly confidential information that should be made available only to opposing outside counsel and not be made available to in-house personnel. (AAR Comment 4.) The Board agrees and will adopt AAR's suggested language. The final rule at § 1108.9 will require an unredacted draft to be issued in accordance with any protective order governing the release of confidential and highly confidential information pursuant to § 1108.7(e).

Under the current rule at 49 CFR 1108.11(a), appeals of arbitration decisions are to be filed "within 20 days of service of a final arbitration decision." NGFA requests that the 20-day period begin when the parties receive the arbitration decision, as opposed to when "a final arbitration decision is reached." (NGFA Comment 7.) The current rules are unclear as to whether the 20-day period begins upon service on the parties (30 days after the close of evidentiary period) or on the Board (60 days after the close of evidentiary period). The Board clarifies here that the 20-day period to file an appeal will begin upon service of the arbitration decision upon the Board, and the final rules at §§ 1108.11 and 1115.8 will include language to that effect. This clarification should address NGFA's concern, as parties should receive the arbitration decision well before the decision is served on the Board.

NGFA requests that the Board require arbitration decisions to be made public by posting them on the Board's website. (NGFA Comment 7.) Under the current rule at § 1108.9(g), redacted copies of the arbitration decisions are published and maintained on the Board's website. Therefore, no changes to the proposed rules are required.

Rate Disputes. Many parties submitted comments on the proposed rules pertaining to the arbitration of rate disputes.

Conceding market dominance. In accordance with section 11708(c)(1)(C), arbitration of rate disputes is only available if the rail carrier has market dominance (as determined under 49 U.S.C. 10707). In the NPR, the Board sought comment on whether parties should be given the option to concede market dominance when agreeing to arbitrate a rate dispute (thereby forgoing the need for a determination from the Board) or, alternatively, whether the Board should limit the availability of the arbitration process in rate disputes to cases where market dominance is conceded. Several parties supported the option for a rail carrier to concede market dominance. (ACC Comment 3, Growth Energy Comment 1, RCC Comment 2, NITL Comment 2.) AAR and NGFA would limit arbitration to situations where market dominance is conceded. (AAR Comment 3, NGFA Comment 3.) Some shippers propose establishing criteria that would trigger a rebuttable presumption of market dominance, such as criteria based on limit price methodology, competitive switching availability, or revenue adequacy. (RCC Comment 2; ACC Comment 4.)

Recognizing that the arbitration process is voluntary and that market dominance determinations may significantly delay the arbitration process, the Board will allow parties to concede market dominance in rate disputes. Parties will also have the option to arbitrate rate disputes where market dominance is not conceded. The Board envisions it would be a rare situation in which the parties disagree on whether there is market dominance but agree to arbitrate a rate dispute. In such a situation, however, there is nothing in the statute that technically prohibits parties from arbitrating. That is, if parties

agree to arbitrate, but only upon a finding of market dominance from the Board, they could request a ruling from the Board solely on the issue of market dominance. The Board declines to adopt a rebuttable presumption of market dominance in these rules, as proposed by ACC and RCC, as it would be inconsistent with the complainant's burden to prove market dominance under the statute. 49 U.S.C. 10707; 5 U.S.C. 556(d); CSX Corp.—Control & Operating Leases/Agreements—Conrail Inc., 3 S.T.B. 196, 266 (1998); Gov't of the Territory of Guam v. Sea-Land Serv., Inc., WCC 101, slip op. at 5-6 (STB served Feb. 2, 2007).

Use of alternative methodologies. As discussed above, under section 11708(c)(3) and the proposed rule at 49 CFR 1108.4, an arbitrator or panel of arbitrators resolving rate reasonableness disputes shall consider the Board's methodologies for setting maximum lawful rates, giving due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues (as determined under 49 U.S.C. 10704(a)(2)). Arbitration decisions "must be consistent with sound principles of rail regulation economics." 49 U.S.C. 11708(d). Several shippers assert that arbitrators should have the flexibility to use alternatives to the Board's methodologies (e.g., the Stand-Alone Cost or Three-Benchmark methodologies) or be allowed to modify the application of these methodologies in resolving rate disputes. (NGFA Comment 5, ACC Comment 2, RCC Comment 1-2.) AAR opposes the use of "untested methodologies" and "methodologies rejected by the agency and the courts." (AAR Reply 3-4.)

The statutory provisions require arbitrators in rate disputes to "consider" Board methodologies, and the final arbitration decision "must be consistent with sound

principles of rail regulation economics.” section 11708(d)(1). The Board finds that this language is adequate to address the commenters’ concerns.

Five-year rate prescription. AAR asks that the Board’s rules reflect the requirement set forth in section 11708(g)(3)(B) that rate prescriptions be limited to five years. (AAR Comment 4.) The Board will amend its rule at § 1108.8 accordingly, noting that an arbitrator may grant relief in the form of a rate prescription in rate disputes, but that the rate prescription shall not exceed five years from the date of the arbitration decision.

Definition of “Rate Disputes.” NGFA recommends that the Board clarify that “rate disputes,” under the proposed §1108.1(m), involve more than “a rail carrier’s rates,” and that the phrase may encompass other charges and surcharges, such as tariff rates for empty tank car movements and fuel surcharges. (NGFA Comment 4.) The Board clarifies that the term “rate disputes” entails challenges to the reasonableness of a rail carrier’s whole line-haul rate, which may include other charges, such as fuel surcharges, in addition to the base rate. See, e.g., N. Am. Freight Car Ass’n v. BNSF Ry., NOR 42060 (Sub-No. 1), slip op. at 7 (STB served Jan. 26, 2007) (rate reasonableness refers to the “total amount paid” in the line-haul rate). A challenge to a tariff rate for empty car movements would be a “rate dispute.” Parties may voluntarily agree to arbitrate other matters under § 1108.4(e), such as the application of a specific charge or fuel surcharge that would not constitute a “rate dispute,” but such disputes would be subject to the monetary award cap of \$2,000,000 for non-rate cases.

Other Items to Address or Clarify. NGFA recommends that the Board define “accessorial charges,” which are listed as matters eligible for arbitration under section

11708 and the proposed rules at § 1108.1(d) and (j). (NGFA Comment 5.) The Board clarifies here that accessorial charges may include, but are not limited to, charges for diversion, inspection, reconsignment, storing, weighing, and other services not specified in the statute and § 1108.1(d) and (j).

Several shippers suggest that the Board maintain a record of unsuccessful attempts to arbitrate disputes, so that if the arbitration system is not well utilized, the record would help the Board understand why the arbitration system is not being used. (ACC Comment 2; RCC Comment 2; NGFA Comment 4.) Given that arbitration is voluntary under these rules, the Board declines to keep a record of unsuccessful attempts to arbitrate. A record of unsuccessful attempts to arbitrate would not necessarily provide useful guidance to the Board, given the wide variety of valid reasons why a party may decline to arbitrate a given dispute.

NGFA recommends that the proposed rules be revised to expressly state that the Board's arbitration rules do not preempt the applicability of, or otherwise supersede, existing industry-operated arbitration systems. (NGFA Comment 8.) The Board's current regulations at § 1108.2(a)(2) provide that "nothing in these rules shall be construed in a manner to prevent parties from independently seeking or utilizing private arbitration services to resolve any disputes they may have." Nothing in the rules we adopt here changes that aspect of the existing rules.

SMART/TD-NY requests that the Board allow third parties, such as labor parties, to intervene in arbitration proceedings. (SMART/TD-NY Comment 7.) As the Board noted in Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Surface Transportation Board, 2 S.T.B. 564, 574 (1997), a central objective of arbitration

is to avoid a formal regulatory proceeding, and allowing the participation of uninvited third parties would contravene the voluntary and informal nature of the arbitration process. Accordingly, the Board denies SMART/TD-NY's request to allow for third-party intervention in arbitration proceedings.

Lastly, SMART/TD-NY states that the labor arbitration standard in 49 CFR 1115.8 should be deleted because labor disputes are not eligible for arbitration. (SMART/TD-NY Comment 9.) Under 49 U.S.C. 11708(b)(2)(C), the Board's arbitration procedures do not apply to disputes "to enforce a labor protective condition." But it is well settled that the Board can delegate authority to arbitrators to adjudicate disputes—subject to Board review—over the appropriate conditions to impose to protect affected employees. Ass'n of Am. R.R.s v. STB, 162 F.3d 101, 107 (D.C. Cir. 1998). Accordingly, the Board clarifies here that § 1115.8 reflects both the standard of review used by the Board for arbitrations conducted pursuant to 49 CFR part 1108 and the standard of review for labor arbitration cases to resolve disputes involving employee protection conditions. In Docket No. 699, the Board inadvertently omitted the standard of review for labor arbitration cases in § 1115.8. In the NPR, the Board properly proposed to correct this omission.

The final rules are set forth below.

Regulatory Flexibility Act. The Regulatory Flexibility Act of 1980 (RFA), 5 USC 601-612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and

(3) make the analysis available for public comment. 5 U.S.C. 601-604. Under section 605(b), an agency is not required to perform an initial or final regulatory flexibility analysis if it certifies that the proposed or final rules will not have a “significant impact on a substantial number of small entities.”

Because the goal of the RFA is to reduce the cost to small entities of complying with federal regulations, the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates those entities. In other words, the impact must be a direct impact on small entities “whose conduct is circumscribed or mandated” by the proposed rule. White Eagle Coop. Ass’n v. Conner, 553 F.3d 467, 478, 480 (7th Cir. 2009). An agency has no obligation to conduct a small entity impact analysis of effects on entities that it does not regulate. United Distrib. Cos. v. FERC, 88 F.3d 1105, 1170 (D.C. Cir. 1996).

In the NPR, the Board already certified under 5 U.S.C. 605(b) that the proposed rules would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. The Board explained that the proposed rules would not place any additional burden on small entities, but rather amend the existing procedures for arbitrating disputes before the Board. The Board further explained that, although some carriers and shippers impacted by the proposed rules may qualify as a “small business” within the meaning of 5 U.S.C. 601(3), it did not anticipate that the revised arbitration procedures would have a significant economic impact on a large number of small entities. The Board noted that, to the extent that the rules have any impact, it would be to provide faster resolution of a controversy at a lower cost. Moreover, the Board noted that the relief that could be accorded by an arbitrator would

presumably be similar to the relief shippers could obtain through use of the Board's existing formal adjudicatory procedures, and at a greater net value considering that the arbitration process is designed to consume less time and likely will be less costly. A copy of the NPR was served on the U.S. Small Business Administration (SBA).

The final rules adopted here make slight modifications to the proposed rules. However, the same basis for the Board's certification of the proposed rules apply to the final rules adopted here. The final rules will not create a significant impact on a substantial number of small entities. The modifications adopted in the final rules refine the proposed arbitration process and clarify the existing regulations. Therefore, the Board certifies under 5 U.S.C. 605(b) that the final rules will not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

Paperwork Reduction Act. In the NPR, the Board sought comments pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501-3549, and Office of Management and Budget (OMB) regulations at 5 CFR 1320.11 regarding: (1) whether the collection of information associated with the proposed arbitration program is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate. No comments were received pertaining to the collection of this information under the PRA.

The proposed collection was submitted to OMB for review as required under the PRA, 44 U.S.C. 3507(d), and 5 CFR 1320.11. OMB is withholding approval pending submission of the final rules. Simultaneously with publishing these final rules, we are submitting the final rules to OMB for approval. Once approval is received, OMB will issue a collection control number (2140-XXXX), and we will publish a notice in the Federal Register. Until renewed, OMB approval of this collection is expected to expire October 30, 2019. Under the PRA and 5 CFR 1320.11, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number. As required, simultaneously with the publication of these final rules, the Board is submitting this modified collection to OMB for review.

List of Subjects

49 CFR Part 1108

Administrative practice and procedure, Railroads.

49 CFR Part 1115

Administrative practice and procedure.

It is ordered:

1. The Board adopts the final rules as set forth in this decision. Notice of the adopted rules will be published in the Federal Register.

2. This decision is effective 30 days after the day of service.

Decided: September 28, 2016.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.

Kenyatta Clay,
Clearance Clerk.

For the reasons set forth in the preamble, under the authority of 49 U.S.C. 1321, title 49, chapter X, parts 1108 and 1115 of the Code of Federal Regulations are amended as follows:

**PART 1108 – ARBITRATION OF CERTAIN DISPUTES SUBJECT TO THE
STATUTORY JURISDICTION OF THE SURFACE TRANSPORTATION
BOARD**

1. Revise the authority citation for part 1108 to read as follows:

Authority: 49 U.S.C. 11708, 49 U.S.C. 1321(a), and 5 U.S.C. 571 *et seq.*

2. Amend §1108.1 as follows:

- a. In paragraph (b), add the words “from the roster” after the word “selected” and remove the word “neutral” and add in its place “lead”.

- b. In paragraph (d), add “rates;” after “subjects:”.

- c. In paragraph (g), add the words “and the Surface Transportation Board Reauthorization Act of 2015” after “1995”.

- d. Revise paragraphs (h) and (i).

- e. Redesignate paragraphs (j) and (k) as paragraphs (k) and (l).

- f. Add a new paragraph (j) and paragraph (m).

The revisions and additions read as follows:

§ 1108.1 Definitions.

* * * * *

(h) *Lead arbitrator or single arbitrator* means the arbitrator selected by the

strike methodology outlined in § 1108.6(c).

(i) *Monetary award cap* means a limit on awardable damages of \$25,000,000 in rate disputes, including any rate prescription, and \$2,000,000 in practice disputes, unless the parties mutually agree to a lower award cap. If parties bring one or more counterclaims, such counterclaims will be subject to a separate monetary award cap.

(j) *Practice disputes* are disputes involving demurrage; accessorial charges; misrouting or mishandling of rail cars; and disputes involving a carrier's published rules and practices as applied to particular rail transportation.

* * * * *

(m) *Rate disputes* are disputes involving the reasonableness of a rail carrier's rates.

3. Amend § 1108.2 as follows:

a. In paragraph (a) introductory text, remove "\$200,000" and add in its place "\$25,000,000 in rate disputes, including any rate prescription, and \$2,000,000 in other disputes" and remove the word "different" and add in its place "lower".

b. In paragraph (a)(1), remove the word "different" and add in its place "lower".

c. Revise paragraph (b).

The revision reads as follows:

§ 1108.2 Statement of purpose, organization, and jurisdiction.

* * * * *

(b) *Limitations to the Board's arbitration program.* These procedures shall not be available:

(1) To resolve disputes involving labor protective conditions;

(2) To obtain the grant, denial, stay or revocation of any license, authorization (e.g., construction, abandonment, purchase, trackage rights, merger, pooling), or exemption related to such matters;

(3) To prescribe for the future any conduct, rules, or results of general, industry-wide applicability;

(4) To resolve disputes that are solely between two or more rail carriers.

Parties may only use these arbitration procedures to arbitrate matters within the statutory jurisdiction of the Board.

4. Amend § 1108.3 as follows:

a. In paragraph (a) introductory text, remove the word “either”.

b. In paragraph (a)(1)(ii), remove the words “different monetary award cap” and add in their place “lower monetary award cap than the monetary award caps provided in this part”.

c. Revise paragraph (a)(2).

d. Remove paragraph (a)(2)(i).

e. Add paragraph (a)(3).

f. In paragraph (b), add “itself” after “not” and remove “within that” and add in its place “prior to the end of the”.

g. In paragraph (c), remove “on a case-by-case basis” and add in its place “only for a particular dispute”.

The revision and addition read as follows:

§ 1108.3 Participation in the Board’s arbitration program.

* * * * *

(a) * * *

(2) Participants to a proceeding, where one or both parties have not opted into the arbitration program, may by joint notice agree to submit an issue in dispute to the Board's arbitration program. The joint notice must clearly state the issue(s) which the parties are willing to submit to arbitration and the corresponding maximum monetary award cap if the parties desire to arbitrate for a lower amount than the monetary award cap that would otherwise be applicable.

(3) Parties to a dispute may jointly notify the Board that they agree to submit an eligible matter in dispute to the Board's arbitration program, where no formal proceeding has begun before the Board. The joint notice must clearly state the issue(s) which the parties are willing to submit to arbitration and the corresponding maximum monetary award cap if the parties desire to arbitrate for a lower amount than the applicable monetary award cap.

* * * * *

5. Amend § 1108.4 as follows:

a. In paragraph (a), add "rates;" before the word "Demurrage".

b. In paragraph (b) introductory text, remove "may not exceed" and add in its place "will be subject to"; remove "\$200,000" and add in its place "\$25,000,000, including any rate prescription,"; and remove "arbitral proceeding" and add in its place "rate dispute and \$2,000,000 per practice dispute".

c. In paragraphs (b)(1) and (2), remove the word "different" and add in its place "lower".

d. In paragraph (b)(3), remove "\$200,000" and add in its place "\$25,000,000,

including any rate prescription,”; remove “case” and add in its place “rate dispute and \$2,000,000 per practice dispute”; and remove “different” and add in its place “lower”.

f. In paragraph (c), remove the words “arising in a docketed proceeding” and add “for a particular dispute” after “consent to arbitration”.

g. In paragraph (e), add a sentence after the second sentence and remove “which” and add in its place “that”.

h. Add paragraph (g).

The revision and additions read as follows:

§ 1108.4 Use of arbitration.

* * * * *

(e) * * * Such disputes are subject to a monetary award cap of \$2,000,000 or to a lower cap agreed upon by the parties in accordance with paragraph (b)(2) of this section.*

* *

* * * * *

(g) *Rate disputes.* Arbitration of rate disputes will only be available to parties if the rail carrier has market dominance as determined by the Board under 49 U.S.C. 10707. In rate disputes, the arbitrator or panel of arbitrators, as applicable, shall consider the Board’s methodologies for setting maximum lawful rates, giving due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues (as determined under 49 U.S.C. 10704(a)(2)).

6. Amend § 1108.5 as follows:

a. In paragraph (a) introductory text, add “Except as provided in paragraph (e) of this section,” to the beginning of the first sentence and remove “Arbitration” and add in

its place “arbitration”.

b. In paragraph (a)(1), remove the word “single-neutral” and add in its place “single”.

c. In paragraph (a)(3), remove the word “different” and add in its place “lower”; remove “\$200,000”; and add “that would otherwise apply” after “cap”.

d. In paragraph (b)(1) introductory text, remove the word “single-neutral” and add in its place “single” wherever it appears and remove the words “the request” and add in their place “that request”.

f. In paragraph (b)(1)(i), remove the word “single-neutral” and add in its place “single”.

g. In paragraph (b)(1)(ii), remove the word “single-neutral” and add in its place “single” wherever it appears; remove “§1108.6(a)-(c)” and add in its place “§1108.6(a) through (d)”; remove the word “matter” and add in its place “case”; and add “by the Board” after “adjudication”.

h. Revise paragraph (b)(2).

i. In paragraph (b)(3), remove the word “different” and add in its place “lower” and remove “\$200,000” and add in its place “otherwise applicable”.

j. Revise paragraph (e).

k. Add paragraphs (f) and (g).

The revisions and additions read as follows:

§ 1108.5 Arbitration commencement procedures.

* * * * *

(b) * * *

(2) When the complaint limits the arbitrable issues, the answer must state whether the respondent agrees to those limitations or, if the respondent is already a participant in the Board's arbitration program, whether those limitations are consistent with the respondent's opt-in notice filed with the Board pursuant to § 1108.3(a)(1)(i). If the answer contains an agreement to arbitrate some but not all of the arbitration-program-eligible issues in the complaint, the complainant will have 10 days from the date of the answer to advise the respondent and the Board in writing whether the complainant is willing to arbitrate on that basis.

* * * * *

(e) *Jointly-filed notice.* In lieu of a formal complaint proceeding, arbitration under these rules may commence with a jointly-filed notice by parties agreeing to submit an eligible matter in dispute to the Board's arbitration program under § 1108.3(a)(3). The notice must:

(1) Contain a statement that all relevant parties are participants in the Board's arbitration program pursuant to § 1108.3(a), or that the relevant parties are willing to arbitrate voluntarily a matter pursuant to the Board's arbitration procedures, and the relief requested;

(2) Indicate whether parties have agreed to a three-member arbitration panel or a single arbitrator;

(3) Indicate if the parties have agreed to a lower amount of potential liability in lieu of the otherwise applicable monetary award cap.

(f) *Arbitration initiation.* When the parties have agreed upon whether to use a single arbitrator or a panel of arbitrators, the issue(s) to be arbitrated, and

the monetary limit to any arbitral decision, the Board shall initiate the arbitration under § 1108.7(a) and provide a list of arbitrators as described in § 1108.6.

(g) *Arbitration agreement.* Shortly after the panel of arbitrators or arbitrator is selected, the parties to arbitration together with the lead or single arbitrator, as applicable, shall create a written arbitration agreement, which at a minimum will state with specificity the issues to be arbitrated and the corresponding monetary award cap to which the parties have agreed. The agreement may also contain other mutually agreed upon provisions.

(1) Any additional issues selected for arbitration by the parties, that are not outside the scope of these arbitration rules as explained in § 1108.2(b), must be subject to the Board's statutory authority.

(2) These rules shall be incorporated by reference into any arbitration agreement conducted pursuant to an arbitration complaint filed with the Board.

7. Amend § 1108.6 as follows:

- a. In paragraph (a), remove “§ 1108.5(a)(1)” and add in its place “§ 1108.5(a)(1) and agreed to by all parties to the arbitration”.
- b. Revise paragraph (b).
- c. Revise paragraph (c) introductory text.
- d. In paragraph (c)(1), remove the word “neutral” wherever it appears and in the second sentence add “lead” in its place.

- e. Revise paragraph (c)(2).
- f. Remove paragraph (c)(3).
- g. Revise paragraph (d).
- h. Redesignate paragraph (e) as paragraph (f).
- i. Add a new paragraph (e).
- j. In newly redesignated paragraph (f)(1), remove “§ 1108.6(b)” and add in its place “§ 1108.6(d)”.
- k. Revise newly redesignated paragraph (f)(2).

The revisions and addition read as follows:

§ 1108.6 Arbitrators.

* * * * *

(b) *Roster.* Arbitration shall be conducted by an arbitrator (or panel of arbitrators) selected, as provided herein, from a roster of persons with rail transportation, economic regulation, professional or business experience, including agriculture, in the private sector. Persons seeking to be included on the roster must have training in dispute resolution and/or experience in arbitration or other forms of dispute resolution. The Board will establish the initial roster of arbitrators by no-objection vote. The Board may modify the roster at any time by no-objection vote to include other eligible arbitrators or remove arbitrators who are no longer available. The Board’s roster will provide a brief biographical sketch of each arbitrator, including information such as background, area(s) of expertise, arbitration experience, and geographical location, as well as general contact information and fees, based on the information supplied by the arbitrator. The roster shall be published on the Board’s website. The Board will update the roster every year.

The Board will seek public comment on any modifications that should be made to the roster, including requesting the names and qualifications of new arbitrators who wish to be placed on the roster, and updates from arbitrators appearing on the roster to confirm that the biographical information on file with the Board remains accurate. Arbitrators who wish to remain on the roster must notify the Board of their continued availability.

(c) *Selecting the lead arbitrator.* If the parties cannot mutually agree on a lead arbitrator for a panel of arbitrators, the parties shall use the following process to select a lead arbitrator: first, each party will be given three peremptory strikes to remove names from the Board's roster. Then, from the remaining names on the roster, each party will submit a list of up to 10 potential arbitrators. If only one arbitrator appears on both lists, he or she would be selected as the single or lead arbitrator. If multiple arbitrators appear on both lists, the parties would alternatively strike names of the jointly listed arbitrators until one remains, beginning with complainant. If no name appears on both lists, the parties would alternatively strike from the Board's entire roster, as amended based on the peremptory strikes. A lead arbitrator shall be selected within 14 days of the Board initiating the arbitration process.

* * * * *

(2) The lead arbitrator appointed through the strike methodology shall serve as the head of the arbitration panel and will be responsible for ensuring that the tasks detailed in §§ 1108.7 and 1108.9 are accomplished.

(d) *Party-appointed arbitrators.* The party or parties on each side of an arbitration dispute shall select one arbitrator from the roster, regardless of whether the other party struck the arbitrator's name in selecting a lead arbitrator. The party or parties

on each side will appoint that side's own arbitrator within 14 days of the Board initiating the arbitration process. Parties on one side of an arbitration proceeding may not challenge the arbitrator selected by the opposing side.

(e) *Use of a single arbitrator.* Parties to arbitration may request the use of a single arbitrator. Requests for use of a single arbitrator must be included in a complaint or an answer as required in § 1108.5(a)(1), or in the joint notice filed under § 1108.5(e). Parties to both sides of an arbitration dispute must agree to the use of a single arbitrator in writing. If the single-arbitrator option is selected, and if parties cannot mutually agree on a single arbitrator, the arbitrator selection procedures outlined in paragraph (c) of this section shall apply.

(f) * * *

(2) If the incapacitated arbitrator was the lead or single arbitrator, the parties shall promptly inform the Board of the arbitrator's incapacitation and the selection procedures set forth in paragraph (c) of this section shall apply.

8. Revise § 1108.7 to read as follows:

§ 1108.7 Arbitration procedures.

(a) *Initiation.* With the exception of rate dispute arbitration proceedings, the Board shall initiate the arbitration process within 40 days after submission of a written complaint or joint notice filed under § 1108.5(e). In arbitrations involving rate disputes, the Board shall initiate the arbitration process within 10 days after the Board issues a decision determining that the rail carrier has market dominance.

(b) *Arbitration evidentiary phase timetable.* Whether the parties select a single

arbitrator or a panel of three arbitrators, the lead or single arbitrator shall establish all rules deemed necessary for each arbitration proceeding, including with regard to discovery, the submission of evidence, and the treatment of confidential information, subject to the requirement that this evidentiary phase shall be completed within 90 days from the date on which the arbitration process is initiated, unless a party requests an extension, and the arbitrator or panel of arbitrators, as applicable, grants such extension request.

- (c) *Written decision timetable.* The lead or single arbitrator will be responsible for writing the arbitration decision. The unredacted arbitration decision must be served on the parties within 30 days of completion of the evidentiary phase. A redacted copy of the arbitration decision must be served upon the Board within 60 days of the close of the evidentiary phase for publication on the Board's website.
- (d) *Extensions to the arbitration timetable.* The Board may extend any deadlines in the arbitration timetable provided in this part upon agreement of all parties to the dispute.
- (e) *Protective orders.* Any party, on either side of an arbitration proceeding, may request that discovery and the submission of evidence be conducted pursuant to a standard protective order agreement.

9. Amend § 1108.8 by revising paragraph (a) to read as follows:

§ 1108.8 Relief.

(a) *Relief available.* An arbitrator may grant relief in the form of monetary damages or a rate prescription in rate disputes to the extent they are available under this

part or as agreed to in writing by the parties. A rate prescription shall not exceed 5 years.

* * * * *

10. Amend § 1108.9 as follows:

- a. Revise paragraph (a).
- b. In paragraph (b), remove the word “neutral” and add in its place “lead or single”.
- c. In paragraph (d), remove the heading “*Neutral arbitrator authority*” and add in its place “*Lead or single arbitrator authority*”; remove the word “neutral” from the first sentence and add in its place “lead or single”; and add “, if any,” after “what”.
- d. In paragraph (e), remove the word “neutral” wherever it appears and add in its places “lead or single” and remove “§ 1108.7(b)” and add in its place “§ 1108.7(c)”.
- e. In paragraph (f), remove the word “neutral” and add in its place “lead or single”.

The revision reads as follows:

§ 1108.9 Decisions.

(a) *Decision requirements.* Whether by a panel of arbitrators or a single arbitrator, all arbitration decisions shall be in writing and shall contain findings of fact and conclusions of law. All arbitration decisions must be consistent with sound principles of rail regulation economics. The arbitrator shall provide an unredacted draft of the arbitration decision to the parties to the dispute, in accordance with any protective order governing the release of confidential and highly confidential information pursuant to § 1108.7(e).

* * * * *

11. Amend § 1108.11 as follows:

- a. In paragraph (a), add “upon the Board” after “20 days of service”.
- b. Revise paragraph (b) introductory text.

The revision reads as follows:

§ 1108.11 Enforcement and appeals.

* * * * *

(b) *Board’s standard of review.* On appeal, the Board’s standard of review of arbitration decisions will be narrow. The Board will review a decision to determine if the decision is consistent with sound principles of rail regulation economics, a clear abuse of arbitral authority or discretion occurred; the decision directly contravenes statutory authority; or the award limitation was violated. Using this standard, the Board may modify or vacate an arbitration award in whole or in part.

* * * * *

12. Amend § 1108.12 as follows:

- a. Revise paragraph (b).
- b. Remove paragraphs (c) and (d).

The revision reads as follows:

§ 1108.12 Fees and costs.

* * * * *

(b) *Costs.* The parties shall share the costs incurred by the Board and arbitrators equally, with each party responsible for paying its own legal and other associated arbitration costs.

PART 1115 – APPELLATE PROCEDURES

13. The authority citation for part 1115 is revised to read as follows:

Authority: 5 U.S.C. 559; 49 U.S.C. 1321; 49 U.S.C. 11708.

14. Revise § 1115.8 to read as follows:

§ 1115.8 Petitions to review arbitration decisions.

An appeal of right to the Board is permitted. The appeal must be filed within 20 days upon the Board of a final arbitration decision, unless a later date is authorized by the Board, and is subject to the page limitations of § 1115.2(d). For arbitrations authorized under part 1108 of this chapter, the Board's standard of review of arbitration decisions will be narrow, and relief will only be granted on grounds that the decision is inconsistent with sound principles of rail regulation economics, a clear abuse of arbitral authority or discretion occurred, the decision directly contravenes statutory authority, or the award limitation was violated. For labor arbitration decisions, the Board's standard of review is set forth in Chicago and North Western Transportation Company—Abandonment—near Dubuque & Oelwein, Iowa, 3 I.C.C.2d 729 (1987), aff'd sub nom. International Brotherhood of Electrical Workers v. Interstate Commerce Commission, 862 F.2d 330 (D.C. Cir. 1988). The timely filing of a petition will not automatically stay the effect of the arbitration decision. A stay may be requested under § 1115.3(f).

[FR Doc. 2016-24065 Filed: 10/5/2016 8:45 am; Publication Date: 10/6/2016]